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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM RANDOLL et al., Plaintiffs and Respondents, v. SUPRALIFE INTERNATIONAL, Defendant and Appellant.	D036365 (Super. Ct. No. SB006644)

APPEAL from an order of the Superior Court of San Diego County, Luis R. Vargas, Judge. Affirmed.

Twelve minority shareholders brought a shareholders' derivative suit against SupraLife International, its controlling managers and directors, and its accountants, alleging SupraLife's majority shareholder and former CEO converted corporate assets for his own use, and the other defendants actively assisted in or facilitated this improper conduct. After plaintiffs completed substantial discovery, SupraLife substituted as plaintiff, and entered into settlements resulting in significant management changes and the former CEO's agreement to reimburse the company in the amount of $2.1 million.

The sole issue on appeal is the propriety of the trial court's order requiring SupraLife to pay $550,000 for attorney fees incurred by the derivative plaintiffs. SupraLife contends the court erred in failing to consider several factors in awarding derivative plaintiffs attorney fees under the substantial benefit doctrine. We conclude the court considered the appropriate factors and did not abuse its discretion in determining the award was warranted.

SUMMARY OF RELEVANT FACTS

In 1991, Peter Holliday formed SupraLife to sell nutritional supplements through a nationwide distributor network. Holliday served as the initial board chairman and CEO. Three years later, Holliday moved to New Zealand, and SupraLife began transferring funds to his New Zealand bank account. Holliday used most of these funds to pay his personal expenses. When this fact was discovered, the company recharacterized the funds as a loan of approximately $900,000, but that loan was never approved by the board of directors or the shareholders. In 1996, Holliday benefited from a stock repurchase agreement in which he obtained substantial additional funds from SupraLife. Shortly thereafter, Holliday resigned as CEO, and defendant John Wilson assumed control as president and chief financial officer. Wilson was previously a partner of SupraLife's independent accounting firm that had been responsible for auditing SupraLife's financial statements.

In May 1998, a group of minority shareholders (derivative plaintiffs) filed a lawsuit against SupraLife, Holliday, Wilson, and several other officers and directors. Before bringing the complaint, derivative plaintiffs notified SupraLife's board of directors of the allegations, but the board refused to act. In their amended complaint, derivative plaintiffs asserted two types of claims *on behalf of the corporation*: (1) claims that Holliday and the other defendants committed fraud and other misconduct resulting in the waste and misappropriation of SupraLife's assets; and (2) professional negligence and misrepresentation claims against SupraLife's accountants, alleging the accountants knew or should have known of Holliday's diversion of funds, but failed to disclose these facts. Derivative plaintiffs also brought *individual claims* for involuntary corporate dissolution, breach of fiduciary duty, and unjust enrichment based on defendants' alleged fraud and mismanagement.

During the next 15 months, derivative plaintiffs engaged in extensive discovery, motion practice, and trial preparation, incurring substantial attorney fees. Finally, in August 1999, SupraLife appointed a Special Litigation Committee (Committee) to analyze the asserted claims and make an independent determination whether the corporation's best interests were served by continuing to litigate those claims.[1] After an investigation during which the Committee evaluated the facts generated from derivative

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1 A "Special Litigation Committee" refers to a committee of disinterested directors formed to determine whether it is in the best interests of the corporation to pursue the claims asserted in the derivative action. (See *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1158-1163; *Will v. Engebretson & Co.* (1989) 213 Cal.App.3d 1033.)

plaintiffs' discovery, the Committee filed a report finding many of the derivative plaintiffs' claims had merit, and recommending that SupraLife pursue these claims.

Among the Committee's conclusions were that:

- Holliday had never repaid the $900,000 "loan," Holliday's stock repurchase agreement was "illegal," and Holliday used his corporate position to benefit himself to the detriment of the company by paying himself an exorbitant salary and large bonuses;
- Holliday "severely damaged" SupraLife and "took for himself any spare cash that happened to be in the corporate coffers, often leaving SupraLife unable to pay its creditors and [distributors] . . . ";
- defendant Wilson assisted in "whitewash[ing]" Holliday's "pillaging" of corporate funds, and it was likely Wilson understood the damage that Holliday had caused to SupraLife;
- "there [was] sufficient evidence to pursue [SupraLife's accountants] for damages arising from the firm's professional negligence and failure to meet the appropriate standard of care"; and
- "evidence unearthed by [derivative] plaintiffs' counsel . . . suggest[ed] that there were irregularities in . . . [the] audit reports . . . ," including "several hundred thousand dollars" in personal fund transfers that were not identified or properly characterized.

On November 30, 1999, SupraLife moved to substitute as plaintiff in the lawsuit with respect to the derivative claims. SupraLife argued that derivative plaintiffs were no longer the proper plaintiffs because SupraLife now accepted their demand that it pursue claims against the officers/directors who committed the wrongful conduct.

Derivative plaintiffs responded by filing a memorandum stating they did not oppose SupraLife's motion. Derivative plaintiffs further agreed to dismiss without prejudice their claim for involuntary dissolution of SupraLife, and the court later entered the dismissal. The court also entered an order substituting SupraLife as the plaintiff in the action. Thereafter SupraLife was the plaintiff, and the derivative plaintiffs were no longer parties to this action.

In its role as plaintiff, SupraLife entered into settlement agreements with several of the individual defendants. These settlements resulted in the defendants agreeing to resign as officers or directors of the company and/or to reimburse SupraLife for funds improperly taken. In its settlement agreement with Holliday, SupraLife agreed to dismiss its claims against Holliday in exchange for Holliday's agreement to (1) resign from the board of directors and as CEO; (2) place his 3.4 million SupraLife shares in a trust over which he would have no voting or other rights; and (3) execute a $2.1 million promissory note (Note) due on or before June 30, 2000, secured by Holliday's SupraLife shares. The agreement provided that if Holliday defaulted on the Note, SupraLife was entitled to foreclose on the 3.4 million shares and the fair market value of the shares "shall be set off against the amount which remains due and owing under the note . . . ." Holliday also entered into a stipulation for entry of judgment under which he consented to judgment being entered against him if he defaulted on the Note.

Derivative plaintiffs then moved for $777,736 in attorney fees and costs under the substantial benefit doctrine, which permits a court to order a corporation to bear legal fees in a shareholders' derivative action when the action conferred a substantial benefit on the corporation. In support of their motion, derivative plaintiffs identified numerous benefits resulting from the lawsuit, including the complete management change, the fact that Holliday's shares had been placed in a trust, Holliday's agreement to repay the $2.1 million, and the cancellation of monthly obligations of approximately $34,000 owed to Holliday's wholly owned companies. The requested amount of $777,736 consisted of a $652,097.50 lodestar (the number of attorney hours multiplied by each attorney's reasonable hourly rate) enhanced by a multiplier of 15 percent plus expenses. Derivative plaintiffs supported the motion with detailed time records identifying the numerous tasks performed by each attorney and declarations justifying the claimed hourly rates (between $150 and $200).

SupraLife opposed the motion on numerous grounds. Of particular relevance here, SupraLife argued that attorney fees should not be awarded because SupraLife "does not have the financial means to pay [derivative plaintiffs] any attorneys' fees." In support, SupraLife submitted the declaration of its chief financial officer, who stated that SupraLife's "balance sheet reflects total liabilities in excess of total assets of $950,000," and that its "current liabilities exceed current assets by over $1.7 million."

In reply, derivative plaintiffs maintained that SupraLife's cited legal authority did not support its argument that a defendant's financial situation should be considered in determining whether to award attorney fees under the substantial benefit doctrine. Derivative plaintiffs additionally challenged SupraLife's *factual* assertion that it could not afford to pay a fee award, claiming that SupraLife's financial evidence was not "credible" and that SupraLife "obtained a $2.1 million settlement that can be used to pay the fees."

Derivative plaintiffs asserted that if Holliday fails to pay the settlement, "[a]ny award . . . can be paid partially from the returned Holliday stock" and that "plaintiffs are willing to accept the stock at its [fair market value] to pay an equivalent portion of the attorneys fees."

After considering the parties' submissions, the court issued a lengthy telephonic ruling, concluding an attorney fees award was warranted. The court explained that derivative plaintiffs established SupraLife obtained substantial benefit from the lawsuit, and rejected "SupraLife's position that [the] benefits conferred [were] outweighed by the harm suffered by the corporation . . . ." With respect to the ability-to-pay issue, the court said it did not believe SupraLife's financial condition was a proper factor in the analysis, but noted that "SupraLife's characterization of its financial condition does not appear to consider the $2.1 million payment by Holliday in settlement of this case." The court agreed, however, to reduce the amount of the award from the claimed amount to $550,000.

At the June 30 hearing on the motion, SupraLife's counsel focused exclusively on challenging the court's factual finding that the $2.1 million settlement payment would provide a monetary basis for SupraLife to pay the attorney fees award. SupraLife's counsel said that SupraLife wanted to present "new evidence" that Holliday had not yet paid this amount even though it was due on the date of the hearing. The court responded that it would be willing to consider this new evidence on an appropriate reconsideration motion. After taking the matter under submission, the court entered judgment confirming its telephonic ruling, but stayed execution of the judgment to permit SupraLife to file a reconsideration motion.

SupraLife then moved for reconsideration based on several alleged new facts, including (1) Holliday's failure to make the $2.1 million payment required by the settlement agreement by the June 30 due date; (2) Holliday's alleged statements that he did not intend to pay the $2.1 million; and (3) SupraLife's failure to ultimately prevail on the claims against the accountant defendants.

The court granted reconsideration, but after expressly considering the new evidence, it concluded that its original determination was correct.

SupraLife appeals.

DISCUSSION

I. *Summary of Applicable Law and Contentions*

A plaintiff in a shareholders' derivative action may recover attorney fees under "one of two doctrinal theories of recovery: the substantial benefit rule and the common fund doctrine." (*Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92, 106; see *Mandel v. Hodges* (1976) 54 Cal.App.3d 596, 620 (*Mandel*); *Fletcher v. A. J. Industries, Inc.* (1968) 266 Cal.App.2d 313, 318-325 (*Fletcher*).) The substantial benefit doctrine "permits the award of fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuiniary nature." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 38.) In the exercise of its equitable discretion, the court may order the award if the "dictates of justice" require that "those receiving the benefit should contribute to the costs of its production." (*Ibid*.) In exercising these equitable powers, the trial court has broad discretion, and the order will not be disturbed unless the appellate court is convinced the award is "clearly wrong." (*Mandel*, *supra*, 54 Cal.App.3d at p. 624.)

In the court below, SupraLife raised a multitude of arguments in an attempt to convince the trial court not to grant the requested fees. Many of these arguments have not been reasserted on appeal. SupraLife, for example, no longer contends that attorney fees were improper because one of the derivative plaintiffs had a conflict of interest. SupraLife additionally does not challenge the sufficiency of the evidence to support the reasonableness of the attorney fees amount awarded. SupraLife further does not challenge that the corporation in fact received at least one substantial benefit from the shareholders' derivative suit – permanently removing control of the corporation from those who had used corporate funds for their personal gain and from those who had facilitated this conduct.

Instead, the thrust of SupraLife's appeal is that the trial court failed to consider several factors which should have lead the court to the conclusion that SupraLife did not realize a *net* benefit from the lawsuit. Specifically, SupraLife argues the trial court erred in failing to consider (1) SupraLife's ability to pay for the attorney fees award; (2) the cost of continuing to pursue derivative plaintiffs' claims against SupraLife's accountants; and (3) the defense costs incurred in defending against the derivative plaintiffs' individual claims. For the reasons explained below, we conclude the court did properly consider these factors, and did not abuse its discretion in concluding that despite these factors SupraLife did receive a substantial benefit from the lawsuit.

II. *Defendant Corporation's Ability to Pay For Attorney Fees*

SupraLife first contends the trial court erred in refusing to consider SupraLife's claimed inability to pay as a factor in determining whether to award attorney fees under the substantial benefit doctrine.

While there is no California case directly on point, federal courts have recognized that a defendant's financial condition may be a proper factor in determining the appropriateness of an attorney fees award under the substantial benefit doctrine. (See *Hall v. Cole* (1973) 412 U.S. 1, 9, fn. 13 (*Hall*); *Pergament v. Kaiser-Frazer Corporation* (6th Cir. 1955) 224 F.2d 80, 82; see also 10 Fed. Proc., L.Ed. § 25:204 (1994).) In *Hall*, the United States Supreme Court held that a former union member whose legal action established certain free speech rights within the union was entitled to attorney fees under the substantial benefit doctrine. In a footnote, the court rejected the union's argument that the federal court was precluded from awarding fees because the evidence showed the payment of counsel fees from the union's treasury might impair the union's ability to continue operations. (*Hall, supra*, 412 U.S. at p. 9, fn. 13.) But the court noted the ability to pay issue is "undoubtedly an important one" and is relevant "to the exercise of the District Court's discretion on a case-by-case basis." (*Ibid.*)

We believe this conclusion applies equally under California law. To recover under the substantial benefit doctrine, minority shareholders must show the benefits realized by the corporation were "sufficiently 'substantial'" to warrant the award. (*Fletcher, supra*, 266 Cal.App.2d at pp. 324-325.) But if the cost of the lawsuit far outweighs the corporation's net worth and expected income after the asserted benefit is conferred and would severely undermine the corporation's financial stability, a trial court in its exercise of discretion could reasonably conclude that the corporation never realized a true benefit and thus that it would be unfair to saddle the corporation with the costs of the litigation. (See *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 945.) We hold that as part of a trial court's broad equitable powers in determining the existence of a "substantial benefit," a trial court may consider – as one of many relevant factors – the relative costs of the litigation as compared to the financial health of the corporation after the claimed benefit has been bestowed.

But there was no error here because the record makes clear the trial court did in fact expressly consider SupraLife's financial ability to bear the $550,000 award. In its initial order the court stated that SupraLife's ability to pay was not a factor in the analysis, but then stated an alternate basis for its rejection of SupraLife's argument – that the $2.1 million settlement payment by Holliday would provide sufficient funds to pay the fees. At the ensuing hearing, SupraLife's counsel focused exclusively on challenging this *factual* finding, explaining to the court that it was unlikely Holliday would comply with his obligation to pay this amount. The court responded by stating that SupraLife could raise this issue on a reconsideration motion supported by the appropriate new facts. SupraLife then filed a reconsideration motion based in part on the facts showing that Holliday did not intend to execute the $2.1 million promissory note, and the trial court granted the motion to reconsider. After considering this evidence, the court affirmed its original order, noting that (1) SupraLife failed to prove it would not be able to collect the

$2.1 million from Holliday; and (2) even if SupraLife is ultimately unable to collect from Holliday, "it can foreclose on Holliday's 3,000,000 shares and re-issue them to raise new revenue or pay old debts." Based on this record, we reject SupraLife's contention that the court failed to consider SupraLife's ability to pay the attorney fees award.

We also reject SupraLife's challenges to the court's factual findings on this issue. Preliminarily, we point out that SupraLife's arguments reflect a misunderstanding of how the ability-to-pay factor fits into the substantial benefit analysis. The trial court was not required to find SupraLife had the financial means to pay the award before it could award attorney fees. Instead, the trial court was entitled to consider SupraLife's financial condition as one fact among many relevant factors in its equitable determination as to whether SupraLife obtained a true benefit from the litigation and therefore whether it would be fair to shift the cost of the lawsuit from the minority shareholders to the corporation as a whole. The record shows the court weighed the relevant facts, and reached a reasonable conclusion that SupraLife's financial condition did not preclude the attorney fees award. There was no abuse of discretion.

In challenging the court's factual findings, SupraLife contends it produced uncontradicted evidence that SupraLife did not receive a benefit from the litigation because an attorney fees award would necessarily compel it to file for bankruptcy. However, this argument was based solely on the declaration of its executive vice president and chief financial officer, Stephen Leisenring, who said the award would "probably" require SupraLife to file for bankruptcy. This equivocal statement does not establish bankruptcy was inevitable. Moreover, the trial court had a rational basis to discount Leisenring's statements about the company's negative net worth because Leisenring failed to support his declaration with reasonable documentation, such as balance sheets or other financial information. Additionally, derivative plaintiffs submitted their counsel's declaration wherein he explained that SupraLife officials had previously claimed imminent bankruptcy if an award was entered against it in a different lawsuit, but that this result had never occurred. Derivative plaintiffs also produced evidence showing that a board member had recently represented that the company was making $65,000 per month, supporting a reasonable conclusion that the company had potential long-term financial viability.

Additionally, the trial court had ample factual basis to find that Holliday's promise to pay the $2.1 million provided the company with a true and substantial benefit, even though the evidence showed the note had not yet been paid and Holliday had allegedly told SupraLife "he has no money [and] will not make the payment . . . ." The undisputed evidence established SupraLife had the right to immediately enter the stipulated judgment against Holliday. SupraLife argued it could not successfully collect on this judgment, but supported this argument only with Leisenring's statements that SupraLife plans to hire a financial investigator, and that unless this investigator finds that Holliday has substantial assets subject to execution, "it may not be cost effective . . . to pursue" the judgment. Given the conditional nature of these statements and the fact that no collection had even been attempted, the court was entitled to find these statements were insufficient to show the judgment could not be collected. Moreover, derivative plaintiffs produced evidence reflecting that during the previous month SupraLife had used shares previously owned by a director to "pay off certain of its debts to its distributors," and "these shares were valued at [30] cents per share." Based on this record, the court's finding that SupraLife's foreclosure rights had substantial value was supported.

III. *Claims Brought Against SupraLife's Accountants*

SupraLife next argues the trial court erred in its substantial benefit analysis by "refusing to consider" the costs that SupraLife incurred in its unsuccessful pursuit of the derivative claims brought against SupraLife's accountants, Harlan & Boettger and Wilson. This argument is unavailing because the record shows the court properly considered the costs of this portion of the litigation.

In their complaint, derivative plaintiffs alleged that SupraLife's independent accounting firm, Harlan & Boettger, was liable for negligence and fraud in auditing SupraLife's financial statements. The complaint further alleged that Wilson, the accounting firm's partner in charge of SupraLife's audit, committed substantial additional wrongdoing when he became a shareholder, officer, and director of the company. The Special Litigation Committee found the claims against Wilson and Harlan & Boettger had substantial merit. Thus, when SupraLife substituted as plaintiff, it continued to pursue the claims against the accountants. However, SupraLife was ultimately unsuccessful on these claims. After SupraLife filed its opposition to the attorney fees motion, it settled the claims against Harlan & Boettger for $10,000, and the court granted Wilson summary judgment.

In moving for reconsideration of the attorney fees award, SupraLife argued the net cost of continuing this portion of the litigation (approximately $80,000 in costs and fees) negated the existence of an overall benefit to the corporation from the litigation. In rejecting this argument, the court acknowledged that the fact SupraLife sustained substantial net costs to maintain the accountant claims "[was] more persuasive" than its other opposition arguments, but the court stated this fact, when considered "in the context of the other substantial benefits," did "not warrant a changed ruling."

This record affirmatively shows the court expressly considered the $80,000 net cost associated with the claims against the accountants, but concluded that, on balance, these costs did not outweigh the benefits received from the institution and settlement of the derivative litigation. There was ample evidence for the court to reach this conclusion. The evidence established that the former CEO was essentially using the corporation as his own private bank account and for several years had been funneling millions of dollars into his own personal projects, and that several of the other defendants had been supporting and facilitating this conduct. When viewing the lawsuit as the arrow that pierced this bubble of improper conduct and the fact that SupraLife now held a $2.1 million secured note from the former CEO, the trial court had a reasonable basis to find that the $80,000 net cost was substantially outweighed by the gains realized by the lawsuit.

Additionally, although SupraLife did not ultimately obtain a substantial monetary judgment on its claims against the accountants, the record is devoid of evidence that the reason for this failure had anything to do with the merits of the claims against the accountants or with derivative plaintiffs' initial decision to bring the lawsuit against these defendants. Based on its independent Committee's report, SupraLife made a deliberate decision to pursue these claims against the accountants, and certainly had the choice to dismiss those claims if it believed the costs of the litigation would not be worth the expected judgment. The court did not abuse its discretion in finding SupraLife obtained substantial benefits from the lawsuit, despite the net cost of continuing to pursue the claims against the accountants.

IV. *Involuntary Dissolution Claim*

In addition to bringing derivative claims against SupraLife on behalf of the corporation, the derivative plaintiffs, on their own behalf, sought involuntary dissolution under California Corporations Code section 1800, subdivision (b)(4), which permits a court to order a corporation to dissolve if those in control of the corporation have committed fraud, mismanagement, or abuse of authority.[2] Derivative plaintiffs dismissed this cause of action after they stipulated to SupraLife's substitution as a plaintiff in the lawsuit and after Holliday executed the settlement agreement. The court found SupraLife was the prevailing party for cost purposes on the individual claims. (Code Civ. Proc., § 1032.)

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2 Corporations Code section 1800, subdivision (b)(4), permits minority shareholders to petition for involuntary dissolution where "[t]hose in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders or its property is being misapplied or wasted by its directors or officers."

SupraLife argues the derivative plaintiffs "improperly joined derivative claims and individual claims against the corporation." This argument – raised for the first time on appeal – is not persuasive. If SupraLife believed the claims to have been improperly joined, they were obligated to raise the issue at the pleading stage.

In opposing the attorney fees request, SupraLife argued that the derivative lawsuit did not provide a substantial benefit because SupraLife was required to incur substantial attorney fees to "defend against the threat of involuntary dissolution," including attorney fees for the individual defendants as part of its indemnity obligation, and additional costs because the involuntary dissolution claim damaged its credit. SupraLife maintained that "any benefits from [the] settlements were more than offset by the diversion of SupraLife management time and legal expenses incurred in the defense of the dissolution claim." SupraLife further argued that derivative plaintiffs unnecessarily delayed in dismissing the involuntary dissolution claim, and did so only in response to SupraLife's threat of a sanctions motion based on the frivolous nature of the claim.

SupraLife contends the trial court erred in failing to give any consideration to these arguments in reaching its conclusion that attorney fees were warranted. This contention fails because the record does not reflect the court failed to consider the relevant facts. Moreover, we are unpersuaded that the individual claims should have any bearing on the trial court's substantial benefit analysis.

In determining whether attorney fees are justified under the substantial benefit theory, the focus is on whether the derivative claim resulted in a substantial benefit to the corporation. (*Fletcher, supra,* 266 Cal.App.2d at pp. 319-325.) SupraLife fails to cite, and our independent research has not disclosed, any authority supporting the conclusion that, in determining whether a corporation received a substantial benefit from derivative litigation, the trial court must weigh the burden on the corporation from other unsuccessful claims against the corporation brought by the same plaintiffs in their individual capacities. Although SupraLife cites numerous cases which it says support the principle that in determining the existence of a substantial benefit, courts must assess the litigation "as a whole" (see, e.g., *Serrano v. Priest, supra,* 20 Cal.3d at p. 42; *Mandel, supra,* 54 Cal.App.4th at p. 622; *Fletcher, supra,* 266 Cal.App.2d at p. 324), in none of these cases did the court state or suggest an unsuccessful result on individual joined claims should be a factor in the analysis of whether the *derivative claims* resulted in a benefit.

The theory underlying the substantial benefit doctrine is that fairness requires a corporation to pay for legal fees for an action *brought on its behalf* if it obtained a substantial benefit resulting from those services. (*Fletcher, supra,* 266 Cal.App.2d at pp. 324-325.) The fact that the corporation was also required to incur *defense fees* and *indemnity costs* for additional individual claims made by the derivative plaintiffs should have no bearing on this issue. Were this the rule, it would mean that the more vigorously the corporation attempts to defend itself from the shareholder's individual claims, the weaker the claim would be for a substantial net benefit from the derivative claims. We decline to endorse such reasoning.

Of course, any fees incurred by the plaintiffs for their individual dissolution claim cannot be shifted to the corporation because those fees were not incurred *on behalf of the corporation*. In its statement of decision, the trial court expressly recognized this principle and reduced the amount of the attorney fees by more than $200,000. The trial court's statement of decision supports that at least part of this reduction was to reflect an award that included only those fees incurred to bring the derivative claims.

In a supplemental letter brief, SupraLife directs this court to the recent decision in *Zucker v. Westinghouse Electric Corp*. (3d Cir. 2001) 265 F.3d 171. In *Zucker*, the derivative shareholder plaintiffs settled their lawsuit for the sole purpose of permitting a settlement of a *separate* class action lawsuit against the corporation. (*Id*. at pp. 172-174.) It was undisputed that the only possible benefit from the derivative lawsuit was that the settlement of the lawsuit permitted the settlement of the separate action. (*Id*. at pp. 176-177.) Under those circumstances, the court held attorney fees were unjustified because the derivative plaintiffs were unable to identify a benefit from bringing the lawsuit. (*Id*. at pp. 176-178.) The court noted, however, that generally when a corporation "receives a substantial benefit from the settlement of derivative litigation it will be obvious that the settlement is also a benefit attributable to the institution of the litigation itself and thus a court reviewing the settlement need not focus on the question of whether the litigation benefited the corporation." (*Id.* at p. 176.) That is the situation here. Unlike *Zucker*, the court had ample evidentiary basis to find SupraLife was better off because of the institution and settlement of the litigation than it would have been if the litigation had not been brought.

DISPOSITION

Judgment affirmed. Respondents to recover costs on appeal.

HALLER, J.

WE CONCUR:

KREMER, P. J.

McINTYRE, J.